Congressional Research Service

Memorandum November 4, 2003

TO: Hon. Frank Wolf

FROM: M. Maureen Murphy
Legislative Attorney
American Law Division

SUBJECT: Questions Relating to H.R. 1938/S. 1423, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act

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This responds to your inquiry concerning H.R. 1938/S. 1423, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act. Specifically, you are interested in the ability of the six Virginia Indian Tribes receiving federal recognition under this legislation to conduct gaming operations. This memorandum takes into account certain language respecting gaming by the Virginia Indian Tribes employed in S. 1423 that is not identical to that contained in H.R. 1938 (see *infra,* at 3-4, notes 13 and 14).

To respond to your request, we will briefly: (1) characterize the major provisions of H.R. 1938/ S. 1423; (2) outline the scope of gaming under the Indian Gaming Regulatory Act (IGRA);[1] (3) generally describe gaming available to tribal entities under Virginia law; and (4) set forth steps that would be required for IGRA gaming by the tribes.

H.R. 1938/ S. 1423. Under H.R. 1938/ S.1423, the Chickahominy Indian Tribe, the Chickahominy Indian Tribe-Eastern Division, the Upper Mattaponi Tribe, the Rappahannock Tribe, Inc., the Monacan Indian Nation, and the Nansemond Indian Tribe (the tribes) would be recognized as Indian tribes entitled to federal services and to the various benefits provided to Indians and Indian tribes under federal law. The legislation includes provisions that require the Secretary of the Interior (Secretary) to accept into trust certain lands as reservations for each of the tribes.

The Indian Gaming Regulatory Act. IGRA provides a framework for gaming on "Indian lands,"[2] according to which, Indian tribes may conduct gaming that need not conform to state law. The three classes of gaming authorized by IGRA progress from class I social

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[1] Pub. L. 100-497, 102 *Stat.* 2467, 25 U.S.C. §§ 2701 - 2721; 18 U.S.C. §§ 1166 - 1168.

[2] 25 U.S.C. § 2703(4).

gaming, through class II bingo and non-banking card games, to class III casino gaming.[3] There is also a progression of the types of regulatory oversight prescribed: class I gaming requires a tribal ordinance; class II, a tribal ordinance and National Indian Gaming Commission (NIGC) regulation;[4] and, class III, a tribal ordinance, Commission oversight to some extent,[5] and a tribal-state compact.[6]

One of the requirements for class II and class III gaming is that the gaming be "located in a State that permits such gaming for any purpose by any person, organization or entity."[7] The federal courts have interpreted this to permit tribes to conduct types of gaming permitted in the state without state limits or conditions. For example, tribes in states that permit "Las Vegas" nights for charitable purposes may seek a tribal-state compact for class III casino gaming.[8] On the other hand, the fact that state law permits some form of lottery or authorizes a state lottery may be sufficient to permit a tribe to request a tribal-state compact for some form of class III or casino gambling; but it is not, in itself, sufficient to permit a tribal-state compact authorizing all forms of casino gaming.[9]

Gaming under Virginia Law. The Commonwealth of Virginia permits bingo for charitable purposes by organizations operated exclusively for religious, charitable, community, or educational purposes. Va. Code § 18.2-340.33(4). Presumably, without federal recognition, the Virginia tribes could qualify under one of those categories and conduct bingo pursuant to Virginia law. With tribal recognition, IGRA would permit the tribes to operate bingo without observing any of the Virginia bingo laws or regulations.

Virginia conducts a state lottery, Va. Code § 18.2-334.3, and permits pari-mutuel betting. Va. Code § 18.2-334.4. Virginia law also permits certain forms of gaming in private residences. Va. Code § 18.2-334.[10] Under IGRA, some of these statutes of the Commonwealth would apparently have the effect of opening the door for some form of tribal

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[3] 25 U.S.C. §§ 2703((6) - (8) and 2710.

[4] Tribes that have been issued a certificate of self-regulation for class II gaming by the National Indian Gaming Commission under 25 U.S.C. § 2710(c), as provided in 25 C.F.R. Part 518, may also conduct class II gaming.

[5] The Chairman of the Commission must approve tribal ordinances and management contracts for class II and class III gaming. 25 U.S.C. §§ 2705, 2710, and 2711.

[6] 25 U.S.C. § 2710(d)(1)(C).

[7] 25 U.S.C. §§ 2710(b)(1)(A) and 2710(d)(1)(B).

[8] *Mashantucket Pequot Tribe v. State of Connecticut*, 737 F. Supp. 169 (D. Conn. 1990), *aff'd*, 913 F.2d 1024 (2st Cir.1990), *cert. denied*, 499 U.S. 975 (1991). Compacts may prescribe, with exacting detail, the specifics of each game permitted. See, e.g., the compact between New York State and the Seneca Nation, Appendix A, listing 26 permitted games and the specifications for each. Available at http://www.sni.org when visited on September 29, 2003.

[9] *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F. 3d 1250 (9th Cir. 1994), *opinion amended on denial of rehearing*, 99 F. 3d. 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *State ex rel. Clark v. Johnson*, 120 N.M. 562; 904 P. 2d 11 (1995).

[10] "Nothing in this article shall be construed to make it illegal to participate in a game of chance conducted in a private residence, provided such private residence is not commonly used for such games of chance and there is no operator as defined in subsection 4 of section 18.2-325." Va. Code § 18.2-334.

class III gaming. Currently, of course, the tribes may not conduct a lottery or operate a racetrack.

Gaming under H.R. 1938/ S. 1423. Should H.R. 1938/S. 1423 be enacted, the six Virginia tribes may conduct gaming subject to IGRA,[11] rather than Virginia law, provided they are able to satisfy an exception to IGRA's prohibition on gaming on newly acquired lands, i.e., lands acquired after October 11, 1988. Although H.R. 1938/ S. 1423[12] eliminates IGRA's exceptions to this prohibition on gaming on newly acquired lands that apply to newly recognized or restored tribes, 25 U.S.C. § § 2719(b)(1)(B) (i) and (ii), it does not disturb the general exception. Under that exception, IGRA gaming operations may occur on land acquired for any of the Virginia tribes, provided that the Secretary of the Interior, after consultation with appropriate state and local and nearby tribal officials, finds such operations to be in the best interest of the tribe and its members and not detrimental to the surrounding community and obtains the consent of the appropriate governor.[13]

It should be noted that while there is a slight variation in the wording employed in the two bills with respect to disqualifying trust land of the Virginia Indians for certain of the exceptions to IGRA's prohibition on gaming on lands acquired after October 17, 1988, neither version disqualifies such land for all of the exceptions. The House version, H. R. 1938, contains a rule of construction that states that:

> [n]o reservation or tribal lands or land taken into trust for the benefit of the Tribe *shall be construed to* satisfy the terms for an exception under section 20(b)(1)(B) of the Indian Gaming Regulatory Act (25 U.S.C. 2719(b)(1)(B)) to the prohibition on gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, under section 20(a) of such Act (25 U.S.C. 2719(a)).[14]

The Senate version, S. 1423, specifies that:

> [n]o reservation or tribal land or land taken into trust for the benefit of the Tribe shall *be eligible* to satisfy the terms for an exception under section 20(b)(1)(B) of the Indian Gaming Regulatory Act (25 U.S.C. 2719(b)(1)(B)) to the prohibition on gaming on land acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, under section 20(a) of that Act (25 U.S.C. 2719(a)).[15]

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[11] Pub. L. 100- 497, 102 Stat. 2467 (1988).

[12] H.R. 1938/S. 1423, §§ 106(b), 206(b), 306(b), 406(b), 506(b), and 606(b).

[13] 25 U.S.C. § 2719(b)(A). Federally recognized tribes may seek to place out-of-state-land in trust, in which case, consent would not be required of the Governor of Virginia. If acquisition of land on the Potomac River in Alexandria, Virginia, for example, were at issue, questions may arise as to the impact of the disposition of legal title to the Potomac riverbed that has been the focus of federal legislation and long running litigation. See, e.g., *United States v. Herbert Bryant, Inc*, 543 F. 2d 299 (D.C. Cir. 1976); *United States v. Herbert Bryant*, 740 F. Supp. 863 (D.D.C. 1990), the latter of which has a brief description of the controversy.

[14] H.R. 1938, §§ 106(b), 206 (b), 306(b), 406(b), 506(b), and 606(b).

[15] S. 1423, §§ 106(b), 206 (b), 306(b), 406(b), 506(b), and 606(b).

Under either of these bills, trust land acquired for Virginia Indians would be eligible for the exception under 25 U.S.C. § 2719(a), under which gaming could occur on their lands provided the Secretary made the determination that gaming was in the best interest of the tribe and not detrimental to the local community, and the governor of the state in which the land was located concurred in that determination.

H.R. 1938/S. 1423 has provisions that apply federal law and regulations respecting Indians or Indian tribes to the six Virginia tribes, thereby subjecting them to the provisions of IGRA[16] In general, Indian tribal gaming under IGRA is not subject to state law or regulation.[17] The overall framework of IGRA involves the establishment of a National Indian Gaming Commission with authority to issue regulations, monitor activities, approve tribal gaming ordinances and conduct investigations of Indian gaming operations. IGRA requires tribal ordinances for any form of gaming and creates a three-tiered system with respect to the degree of state and federal input into tribal gaming: class I gaming--social gaming for nominal amounts--is regulated by tribes; class II gaming--bingo and non-bank card games--is regulated by the tribes and the Commission; and class III gaming--all other kinds of gambling--requires a tribal state compact. IGRA sets up an elaborate system for tribes to enter into compacts for class III gaming with states and requires Secretary of the Interior approval for compacts.

Virginia law appears to be such as to permit an Indian tribe to conduct class II bingo, provided other IGRA requirements are met, as well as some form of class III gaming, provided IGRA requirements are satisfied. To conduct class II or class III gaming under IGRA without complying with Virginia laws, such as the limits on bingo prize money and jackpots, under Va. Code § 18.340.33(9), a Virginia tribe would have to meet statutory standards established in IGRA.

For class II (bingo) or class III (casino) gaming, the following criteria must be satisfied:

1. The activity must take place on "Indian lands," a term that is defined to mean "all lands within the limits of any Indian reservation," and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."[18] This means that, for IGRA gaming to take place, the land must be within the limits of the tribal reservation or have been taken into trust.[19]

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[16] H.R. 1938/S. 1423, §§ 103, 203, 303, 403, 503, and 603.

[17] See S. Rep. 100-446, 100th Cong., 2d Sess. 1 (1988), which speaks of "joint regulation by tribes and the Federal Government of class II gaming." In *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 951 F. 2d 757, 759 (7th Cir. 1991), the court stated that IGRA "permits a state to exercise various types of control over class II and class III games," and that "[i]f the games in question are class II gaming activity, ... they may be prohibited by the State, but they cannot be regulated by the State." See also *Gaming Corporation of American v. Dorsey and Whitney,* 88 F. 3d 535, 544 (8th Cir. 1996; *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990).

[18] 25 U.S.C. § 2703(4).

[19] Once the tribes are recognized, in addition to the land specified in H.R. 1938/S. 1423 for mandatory acquisition in trust, they would be able to purchase land elsewhere and request, pursuant

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If the land is acquired after October 17, 1988, the land must qualify for one of the exceptions to IGRA's prohibition on gaming on newly acquired lands.[20] To approve the land for gaming, the Secretary of the Interior must make a two part determination, in which the Governor of the state concurs, that the gaming is: (1) in the best interest of the tribe and (2) not detrimental to the local community.[21] This two-part test would apply to land of the Virginia tribes, in light of the provisions in H.R. 1938/S. 1423.[22]

2. The gaming must take place in a state "that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law)."[23] Virginia's lottery, pari-mutuel betting, and bingo operations would satisfy this requirement for bingo and some class III gaming.

3. The gaming must be authorized by an ordinance or resolution of the governing body of the tribe.

4. The ordinance or resolution must be approved by the Chairman of the NIGC (the Chairman), as meeting requirements established in IGRA.[24]

5. For the NIGC Chairman to approve it, the ordinance or resolution must comply with IGRA's various provisions respecting disposition of net revenues, annual audits, health and safety, and background investigations of employees and primary management officials.[25]

Class II gaming must also satisfy the following criteria:

1. If a tribe enters into a management contract for the operation and management of a class II gaming activity, there are IGRA criteria to be satisfied; and such contracts require approval by the Chairman of the NIGC.[26]

2. There is an explicit requirement that certain forms of class II gaming conform to state law. If card games are involved in a class II operation, the games must be "played in conformity with those laws and regulations (if any) of the

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[19] (...continued)
to various federal statutes, that the Secretary take it into trust for their benefit. Requests for such land acquisition would be processed under regulations issued by the Department of the Interior, 25 C.F.R. Part 151.

[20] 25 U.S.C. § 2719.

[21] The Department of the Interior issued proposed regulations on September 14, 2000, 65 *Fed. Reg.* 55471, and reopened the comment period on December 27, 2001, 66 *Fed. Reg.* 66847, but has yet to issue final regulations.

[22] *Supra*, at n. 11.

[23] 25 U.S.C. § 2710(b)(1)(A).

[24] 25 U.S.C. § § 2710(b)(1)(B) and (d)(2).

[25] 25 U.S.C. § 2710(b)(2).

[26] 25 U.S.C. § 2711(b).

State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." There is no such requirement for bingo games.

For class III gaming, which includes all forms of gaming other than bingo and non-bank card games, IGRA requires:

1. There must be a tribal-state compact governing the conduct of gaming activities. The tribal-state compact may address application of state criminal and civil laws to the tribal gaming, allocation of criminal jurisdiction necessary for enforcing such laws, assessment by the state of tribal gaming activities as necessary to defray the costs of state regulation, taxation by the Indian tribe comparable to the amounts of state taxes for such activities, remedies for breach of contract, standards for operating the facility, and any other directly related subjects.[27] IGRA specifies that states have no authority to impose taxes, fees, charges, or assessments for a tribe to engage in a class III activity.[28] The exact delineation of which games may be covered in any compact depends upon the games permitted in the state to any person. In the case of Virginia, this may ultimately require litigation and judicial construction of Virginia gaming law.

2. The Secretary of the Interior must approve the tribal-state compact. The Secretary may disapprove such a compact only for violation of: (1) IGRA, (2) any other federal law, or (3) the trust obligation of the United States.[29]

3. If the state refuses to negotiate with the tribe, and the tribe sues the state in federal court, and the state pleads sovereign immunity,[30] there is the possibility that, upon the petition of the tribe, that the Secretary may promulgate rules for tribal gaming.

4. The approved tribal-state compact (or procedures promulgated by the Secretary) must be published in the *Federal Register*.[31]

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[27] 25 U.S.C. § 2710(d)(3).

[28] 25 U.S.C. § 2710(d)(4).

[29] 25 U.S.C. § 2710(d)(8)(B).

[30] IGRA has a provision for a tribe to sue the state for failure to negotiate in good faith, 25 U.S.C. § 2710(d)(5)(B), that has been declared unconstitutional. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Subsequent to that the Department of the Interior issued regulations under which the Secretary of the Interior may issue class III gaming procedures when the State raises a sovereign immunity defense under the Eleventh Amendment to a suit brought by a tribe to compel negotiation of a tribal-state compact. 25 C.F.R. Part 291. This regulation has not yet been used.

[31] 25 U.S.C. § 2710(d)(3)(B).